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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JACQUELINE SEATON, Plaintiff and Appellant, v. FILDRES RUNEZ et al., Defendants and Respondents.	A104302 (Alameda County Super. Ct. No. HG03088962)

Plaintiff Jacqueline Seaton appeals the grant of summary judgment of her suit against defendants Fildres Runez and James Hand, Runez's attorney, for malicious prosecution arising out of a prior lawsuit by Runez against plaintiff. The trial court found that Seaton's instant cause of action fails because defendants had probable cause to pursue the prior action. We affirm.

STATEMENT OF THE CASE AND OF THE FACTS

A corporation owned and controlled by Seaton and her husband failed to make payments owed to Runez on a commercial lease of property. In a previous action (the San Francisco action), Runez filed suit against plaintiff and others for breach of the lease contract. The complaint alleged that Seaton and her husband were alter egos of Cedar Village, Inc. (CVI), which leased the subject property from Runez. Pretrial depositions and discovery produced evidence supporting this claim—that Seaton and her husband were the sole shareholders, officers, and directors of CVI; that CVI was undercapitalized for its corporate purposes; that Seaton was actively involved in CVI's corporate affairs;

and that CVI funds were used to pay for Seaton's private expenses, such as her individual American Express bill and payments on her home loan. (See *Cleaning & P. Co. v. Hollywood L. Service* (1932) 217 Cal. 124, 128-130 [corporate shareholders, officers, or directors may be individually liable for corporate activities where there is such unity of interest and ownership that the corporation as a separate entity has effectively ceased to exist, and upholding the corporate shield of liability would promote injustice]; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993 [same].)

At trial, Seaton twice moved for summary judgment on the ground that she could not be held responsible for the breach of the lease contract because she did not personally sign the agreement and therefore was not a party to the contract. The trial court denied both motions. After a bench trial, the court acknowledged that considerable evidence supported Seaton's liability as an alter ego of CVI. It entered judgment in favor of Seaton, however, in light of her trial testimony that she abdicated control of CVI to her husband. This concluded Seaton's active role in the San Francisco action.

Thereafter, Seaton filed the instant action, claiming damages against defendants for malicious prosecution in the San Francisco action. She alleged that defendants improperly filed suit against her for breach of contract when in fact she did not sign the subject contract. Seaton argued that the breach of contract claim was obviously frivolous from its inception because she did not personally sign the lease agreement.

Defendant Hand filed a motion for summary judgment, in which defendant Runez joined. This motion argued that defendants had probable cause to instigate the San Francisco action because the alter ego theory of contract liability was supported by significant evidence of a number of breaches of corporate formalities. They argued that Seaton's claim of malicious prosecution was therefore barred by the existence of probable cause for the prior action. The trial court granted defendants' motion for summary judgment, stating, "there was probable cause for the claims seeking to hold Plaintiff liable in the underlying action for breach of contract based on the theory of alter ego." The court found the fact that Seaton's motions for summary judgment during the prior proceeding had twice been denied showed that Runez had probable cause to pursue

the breach of contract action (citing *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383).

Seaton filed a motion to vacate the judgment and for new trial. She alleged that defendants pursued two claims against her: "breach of contract" and "alter ego." While the "alter ego" claim may not have been frivolous, the "breach of contract" claim was obviously frivolous because Seaton did not sign the lease contract. Because the "breach of contract" claim was frivolous, she argued, she could still pursue her malicious prosecution action against Runez and Hand.

The court denied plaintiff's motion to vacate the judgment and for new trial, writing, "In the underlying action, Defendant Runez alleged one cause of action for breach of contract against Plaintiff [Seaton]. Runez alleged that Plaintiff had 'entered into' written contracts and that Plaintiff was the alter ego of [CVI]. There was no separate cause of action for 'alter ego.' The alter ego allegation was a basis for holding Plaintiff liable for breach of contract based on the theory that as an alter ego of [CVI] she was a party to the contract." Thus, "[n]one of Runez' allegations were dependent upon proof that Plaintiff physically signed the agreements."

DISCUSSION

Here, Seaton appeals the grant of defendants' motion for summary judgment in the malicious prosecution case, again arguing that the existence of two claims in the San Francisco action, one frivolous and one not, should permit her to pursue her malicious prosecution claim as to the frivolous claim. Because there was but one claim against Seaton in the San Francisco action, and that claim was supported by probable cause, Seaton's claim of malicious prosecution fails.

On appeal of an order granting summary judgment in a defendant's favor, we review the record de novo to determine whether defendant has " ' "conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial." ' [Citation.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) A successful claim for malicious

prosecution requires proof that the prior action was commenced by the defendant without probable cause, with malice, and ended in plaintiff's favor. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494.)

A claim lacks probable cause, and may thus expose the plaintiff to a subsequent claim of malicious prosecution, if no reasonable attorney would believe the claim to be legally tenable (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886), knowing what the prosecuting attorney knew at the time of filing suit. (*Downey Venture v. LMI Ins. Co.*, *supra*, 66 Cal.App.4th at pp. 497-498.) The denial of a defendant's motion for summary judgment generally bars a subsequent malicious prosecution claim against the plaintiff, as this denial requires that the trial court find some potential merit in the initial claims. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 820; *Roberts v. Sentry Life Insurance, supra,* 76 Cal.App.4th at p. 383.)

Because Seaton's motions for summary judgment below were denied, the trial court properly granted summary judgment against her malicious prosecution case. Plaintiff claims, however, that defendants made two separate claims in the San Francisco action: breach of contract, and "alter ego," one of which was frivolous, permitting her pursuit of the malicious prosecution cause of action.

While breach of contract is an illegal act that can be remedied by civil suit (see Code Civ. Proc. § 592), behaving as an alter ego is not in itself an actionable status. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2003) ¶ 6:201, p. 6-39 [to use lay terms, "instead of 'alter ego,' say 'the person really in control.' "].) Rather, alter ego is a theory of liability enabling a complainant to prove that someone other than the named corporate defendant is liable for illegal acts by the defendant corporation. (E.g., *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777-778 [chief executive officer and sole shareholder found to be alter ego of bankrupt corporation and thus liable for its debts].) Thus, one is not liable simply for being an alter ego of another entity, unless that entity engages in some malfeasance. (E.g., *Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1014 [successor

entities alleged to be alter egos liable for various tort claims against defendant church]; *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660-661 [member of partnership that failed to pay commissions to employee alleged to be liable for that debt].) Making a claim against an alter ego thus implicates a defendant already listed rather than making an additional claim. (*NEC Electronics, Inc. v. Hurt, supra*, 208 Cal.App.3d 772 at p. 778; *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1420, disagreed with on other grounds by *In re Lavender* (9th Cir. 1999) 180 F.3d 1114, 1122, fn. 11.)

Runez pursued only one claim against Seaton: breach of contract. The theory of "alter ego" was a mechanism to prove Seaton's liability for breach of the contract that she did not individually sign. Therefore, when Runez named Seaton as a defendant, she identified Seaton as an alter ego of CVI rather than claiming that Seaton in her individual capacity had signed the lease agreement. Alter ego was the method of showing her guilt, rather than a separate substantive claim.

The evidence Seaton offers in support of her allegation that Runez filed more than one claim against her is not helpful to our analysis. Her appendix includes a transcript of what appears to be ten minutes during which the trial court in the San Francisco action barred prosecution of any theory of Seaton's contract liability (it described this order as granting a nonsuit) other than by alter ego. This small portion of the record does not contain the parties' or trial court's discussion of the factual or legal considerations leading to this conclusion, nor does it include any reference to the existence of more than one claim against Seaton. Statute bars the grant of a judgment of nonsuit prior to the plaintiff's opening statement. (Code of Civ. Proc., § 581c, subd. (a).) There was no written motion for nonsuit or order granting nonsuit signed by the court explaining the particular grounds for the motion or basis for the order, and thus any judgment ordered

never became effective. (Code Civ. Proc. § 581d;[1] *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 165 [motion for nonsuit must explain in writing the particular defects of plaintiff's case].) Finally, based upon the limited record before us, it is impossible to determine that defendants waived any error by failing to object to the motion for nonsuit. (*Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1225-1226, fn. 7 [plaintiff's failure to object to nonsuit prior to opening statements waived review of issue on appeal].)

Seaton's claim is an example of why malicious prosecution actions are rarely successful. " 'Malicious prosecution is a disfavored action. [Citations.] This is due to the principles that favor open access to the courts for the redress of grievances. In fact, it has been held that access to the courts is a constitutional right founded upon the First Amendment to the United States Constitution. [Citations.] But regardless of any constitutional basis for the policy, it is beyond dispute that the strong public policy of this state favors open access to the courts for the resolution of conflicts.' " (*Downey Venture v. LMI Ins. Co., supra,* 66 Cal.App.4th 478 at p. 493.) Because Runez had legitimate cause to pursue her breach of contract claim against Seaton, the trial court properly granted summary judgment in the subsequent malicious prosecution case against Runez.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal. (See Cal. Rules of Court, rule 27.)

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[1] "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes . . . ." (Code Civ. Proc. § 581d.)

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Sepulveda, J.

We concur:

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Kay, P.J.

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Reardon, J.